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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-848

IGNACIO DELEON MARTINEZ,
JESUS CHAVARRIA GARCIA,

Petitioners,

v.

UNITED STATES ATTORNEY GENERAL
WILLIAM FRENCH SMITH, ET AL.
UNITED STATES OF AMERICA,

Respondents.

PETITIONERS' BRIEF IN REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The

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Ignacio DeLeon Martinez,
Jesus Chavarria Garcia,

Petitioners,

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United States Attorney General
William French Smith, et al
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ISSUES

The United States' Brief in Opposition to the issuance of a Writ of Certiorari raises the following issues:

a) Do the Petitioners have constitutionally protected liberty or other interests within the meaning of *Paul* v. *Davis* 424 U.S. 693 (1976)?

b) If the United States knew that it had no eyewitness or direct proof of bribe payments to the Petitioners, can the United States describe the Petitioners as participants in a bribery scheme without violating the Petitioner's rights under the Fifth and Sixth amendments?

c) In order to have a constitutionally sufficient indictment or information charging an offense under the Foreign Corrupt Practices Court ("FCPA") does the indictment or information have to identify specifically the foreign official to whom a payment or an offer, promise, or authorization of payment was made or directed?

d) Can a defective extradition complaint constitute the basis for the dismissal of a civil case under the Rule of *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970)?

e) Does Mexico's charge of the Petitioners on March 9, 1983 justify describing the Petitioners' in accusatory pleadings filed on September 20, September 23, October 22 and November 17, 1982 in the *Miller*, *Ruston*, *Crawford* and *Harvester* cases as participants in a bribery scheme and the recipients of $9,960,432.40 in bribes?

ARGUMENT

1. The Petitioners as citizens of Mexico have constitutionally protected liberty and property rights within the meaning of *Paul* v. *Davis*, 424 U.S. 693 (1973).

The Petitioners as aliens are entitled to the due process and trial protections of the Constitution. Neither the Fifth nor Sixth Amendments to the Constitution limit their coverage to citizens of the United States. In the *Briggs* and *Smith* cases the Court recognized the existence of liberty and property rights that were protected by the Fifth and Sixth Amendments and found that such rights were violated when individuals were described but not charged as participants in crimes.

In addition to the personal humiliation, dishonor and injury to their reputations for integrity the Petitioners suffered the loss of their Pemex pensions and loss of opportunities for consulting jobs in the fields in which they have spent their working lives.

Judge Cire found harm and damage to DeLeon as the result of the inclusion of his name in the *Crawford* Indictment. Judge Cire's ruling in the Crawford case should have been equally applicable to Chavarria. Judge Cire however, refused to expunge the references to Chavarria.

At pages 16 and 17 of the Petition the Petitioners accurately described the circumstances under which they departed from Mexico, entered the United States and thereafter left the United

States. It is clear that DeLeon, a Mexican citizen, was spending most of his time in the United States, in the fall of 1982 and was entitled to and did invoke the protection of the United States, at the time the accusatory pleadings in respect to him were filed in 1982, at the time the appeal notice was filed and at the time the appeal was perfected.

It is equally clear that under the "No person shall be . . . " concept of the Fifth Amendment and the "accused shall enjoy . . . " concept of the Sixth Amendment, Chavarria was entitled to expect that the United States would not and should not institute actions against or in respect to him that violated the Fifth and Sixth Amendments. The availability of those constitutional guarantees to Chavarria in his individual estate or role did not and should not hinge upon his residence in the United States, Mexico or elsewhere. If the United States takes actions which violate Chavarria's rights, he should be able to challenge such actions. It is also axiomatic that the United States has the absolute power to institute any and all actions against Chavarria that fall within the purview of the Fifth and Sixth Amendments.

The United States has stated no facts that justify its unconstitutional attacks on the Petitioners.

2. The absence of eyewitness and direct proof of the payment of bribes to the Petitioners entitled the Petitioners' to the constitutional guarantees contemplated by the Briggs and Smith cases.

The admissions by the United States, as set forth in Appendix B of the Petitioners' third Supplemental Brief, rebut the allegations of the United States about the payment of bribes to the Petitioners. Whether the United States can prove that the defendants in the *Crawford* case entered into a conspiracy to attempt to bribe the Petitioners will have to await the outcome of a trial on another day. The fact is that in 1982 and today the United States has no proof that the Petitioners were bribed.

3. The FCPA was intended to criminalize the payment of bribes to foreign officials, but it did not change the Constitution nor create a right or an obligation to identify specifically individuals who are not charged with a crime.

In its argument before Judge Bue who initially heard DeLeon's injunction motion and later before Judge Cire, the United States urged that DeLeon should be identified with specificity in order to comply with the requirement of the FCPA. The United States stated that DeLeon "was a central figure in the alleged criminal scheme and an essential element of the charges in the indictment" whose name and position should be disclosed, because his position was central to the alleged crime. Judge Bue required that any indictment naming but not charging DeLeon be sealed and delivered to the judge in whose court the *Crawford* indictment was lodged for final consideration and decision as to whether DeLeon's motion for an injunction barring the use of his name should be granted.

At the hearing on DeLeon's injunction motion, evidence was introduced as to the large number (over 3,000) of adverse newspaper, radio and television reports that had been made about DeLeon and Chavarria and the fact that DeLeon's Pemex pension had been discontinued because of the allegations that had been made against him in September, 1982 in the *Miller* and *Ruston* cases.

Judge Cire entered the following order:

> "Plaintiff DeLeon has suffered humiliation, embarrassment, and damage to his reputation from his name having been in Federal indictments issued in the investigation concerning the Foreign Corrupt Practices Act violations. The harm was shown through Mexican newspaper articles introduced into evidence.
>
> Plaintiff in the future will continue to suffer harm similar to that suffered in the past if the Government continues to use his name in the indictment in Criminal No. H-82-224. Therefore, Plaintiff will suffer irreparable harm.

> It is not necessary that Plaintiff's name appear in the indictment in Criminal No. H-82-224, and the Government will not be harmed if his name is not in the indictment. *See United States* v. *Briggs*, 514 F.2d 794, 805 (5th Cir. 1975). *See also In re Smith*, 656 F.2d 1101 (5th Cir. 1981).
>
> Therefore, it is ORDERED that Plaintiff's motion for preliminary injunction is GRANTED";

Judge Cire subsequently denied DeLeon's motion to expunge his job description from the *Crawford* Indictment and his name and job description from the accusatory pleadings in the *Ruston* case.

Judge O'Connor ordered expungement of job descriptions of the Petitioners from the *Harvester* Offer of Proof, at 10:00 A.M. November 18, 1982 but at the same time denied expungement of job descriptions of the Petitioners from the *Harvester* Information filed at 3:00 P.M. on November 17, 1982 on the grounds that the Petitioners were too late.

4. A defective extradition complaint supported by arguably incompetent evidence should not have been considered and acted upon without a hearing and cannot form the basis for the dismissal of a civil case under the rule of *Molinaro* v. *New Jersey* 396 U.S. 365 (1970).

The extradition complaint that formed the basis for the Fifth Circuit's dismissal of the Petitioners' appeal was defective and was relied upon without an appropriate evidentiary hearing to evaluate the questionable actions of constables in Fort Bend County, Texas, which actions were offered by the the United States in support of its claims under the extradition complaint. The facts are:

a. The March 25, 1983 extradition complaint furnished to the Fifth Circuit stated that a diplomatic request for the extradition of the Petitioners would be made in conformity with the Treaty of Extradition between the United States of America and Mexico, TIAS 9656 ("Treaty") and the formal

papers upon which the demand for extradition was founded would be presented within 60 days as required by Article 11 of said treaty. The foregoing documentation was not provided by Mexico.

Under applicable law the foregoing documentation was necessary to establish that the Petitioners were extraditable pursuant to the specific terms of the Treaty. The documentation was required to be in the possession of the United States by May 24, 1983. The documentation had not been filed in United States Clerk's office by August 29, 1983. To the present knowledge of Petitioner's counsel the documentation still has not been filed in the extradition proceeding.

Without a properly documented extradition complaint the Fifth Circuit did not have a basis to determine whether the Petitioners were fugitives from justice, i.e. the extradition complaint became inoperative by the Treaty's terms when it was not documented by May 24, 1983. The extradition complaint did not constitute competent evidence of the Petitioners' status on June 16, 1983 (date of original order) or August 22, 1983 (date rehearing denied). There is nothing in the official records of the Fifth Circuit or the District Court that shows that an offense has been committed under Mexican law, that an arrest warrant has been issued, or that a crime was committed in Mexico that justified extradition under the treaty except the extradition complaint which has not been documented.

b. The United States submitted to the Fifth Circuit an affidavit of Constable Morgan ("Morgan") of Fort Bend County, Texas. Morgan allegedly saw DeLeon on March 8, 1983. Morgan later advised Petitioner's counsel that he had not initially recalled seeing DeLeon on March 8, 1983 but after his recollection was refreshed when he looked at some records in the office of the Homeowner's Association for the Sugar Creek subdivision where DeLeon's home was located,

he recalled seeing DeLeon. Morgan stated that the Association's records were in the possession of Chief Hughes. When Petitioners' counsel requested Chief Hughes to make the Association's records available to the Petitioners attorney for examination to verify Morgan's statement, Chief Hughes refused to do so until he could get permission from U.S. Trial Attorney Pendergast, and such permission was never obtained even though Chief Hughes knew that the records were required by and important to the Petitioners in presenting their appeal before the Fifth Circuit.

5. Mexico's charging of the Petitioners with crimes on March 9, 1983 does not validate the United States unconstitutional actions in describing the Petitioners in accusatory pleadings in the *Miller, Ruston, Crawford* and *Harvester* cases as participants in a bribery scheme and the recipients of $9,960,432.40 in bribes.

The Petitioners' rights were violated by the United States in United States judicial proceedings in the fall of 1982. The violation was not eliminated or cured by the filing of undocumented and still unproved charges against the Petitioners in Mexico in 1983.

Notwithstanding the Fifth Circuit's statement in *United States* v. *International Harvester Company* 720 F. 2d 419 (5th Cir. 1983) the dismissal of the charges against the Petitioners or the determination in lower or appellate courts of Mexico that the Petitioners are not guilty of the charges made against them in Mexico will have no effect upon the allegations of criminal conduct made against the Petitioners in the *Miller, Ruston, Crawford* and *Harvester* cases. The Fifth Circuit did not provide the legal alchemy which would enable proceedings in Mexico to eradicate the violations of the petitioners' rights in the United States.

The United States invocation of the *Briggs* rule in its Brief to the Tenth Circuit in the *Kilpatrick* case indicates clearly the

United States representatives know or should know that the argument that a trial in Mexico will not cure the United States' violations of the Petitioners' constitutional rights and has no basis in the Treaty, comity or justice.

Conclusion

The Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1291 to determine the disputed question of whether the Petitioners were fugitives from justice. Mexico's failure to perfect the extradition complaint placed the Fifth Circuit in the position of not having before it competent evidence showing the Petitioners to be a fugitive from justice. The record shows that the Petitioners liberty and property interests were violated when the United States described but did not charge them as being participants in a bribery scheme that violated the FCPA. The injuries flowing from the United States' improper actions cannot and will not be undone by actions that occur in Mexico.

Respectfully Submitted,

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